IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 121 of 1995

In

SPECIAL CIVIL APPLICATION No. 1592 of 1983

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

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STATE OF GUJARAT & 2 - Appellant(s)
Versus
DR.MAHESHBHAI V RAVAL - Respondent(s)

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Appearance :
MS ASMITA PATEL, AGP for Appellant
MR MURLI DEVNANI FOR MR YOGESH S LAKHANI for Respondents

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 25/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. By this appeal under Clause 15 of the Letters Patent, the appellant State of Gujarat challenges the judgement and order dated 4th October, 1994 passed by the learned Single Judge in Special Civil Application No.1592 of 1983 whereby the petition has been partly allowed by holding that the respondent (original petitioner) is deemed to be promoted on 24.8.1981, i.e., the date on which his junior Mr. I.S. Parikh was promoted to Class I post and directing the appellants to compute and confer upon the respondent all benefits accordingly.

2. The case of the respondent (original petitioner) as stated in the petition is that he had joined Government service on 25.11.1949 as a Surveyor. Subsequently, after passing the relevant departmental examinations, he was promoted to Class-II post in 1973 and was working as City Survey Mamlatdar at the time of filing the petition.

3. By a letter dated 17.11.1980, the respondent applied for voluntary retirement and also requested for leave preparatory to voluntary retirement from 1.12.80 to 27.2.1981. By order

dated 8.12.1980 leave was granted from 1.12.1980 to 27.2.1981 or from the date when he was relieved. As he was relieved on 8.12.1980, according to the respondent his leave was deemed to have been granted from 8.12.80 to 27.2.1981. Besides, in the letter dated 8.12.80 it was mentioned that necessary orders for voluntary retirement would be issued in due course. It was the case of the respondent that on expiry of leave, he did not get any order of voluntary retirement and that he had anxiously waited for the orders of the Government. However, by an order dated 17.3.82 the respondent was posted to Nadiad and by an order dated 19.3.82, his request for voluntary retirement was turned down. It was the case of the respondent that as his wife was suffering from some major ailment, he could not attend the office and informed the authorities accordingly, vide letter dated 23.3.1982. That vide order dated 3.5.82 he was posted at Rajkot, where he joined service on 6.5.82. It was further the case of the respondent that by a letter dated 3.4.82 he was asked to apply for leave from 28.2.81 till he joined service at Rajkot. The respondent, vide letter dated 2.9.82 requested the Settlement Commissioner and Director of Land Records that leave from 19.3.82 till 6.5.1982 be granted as commuted leave. As regards the period from 28.2.1981 to 18.3.82, it was the case of the respondent that he should be treated as on duty as he was awaiting orders from the Government. According

to the respondent the Government should either have sanctioned the voluntary retirement or given posting order but neither was done till 19.3.1982, hence, he was deemed to be on duty from 28.2.1981 to 18.2.1982 and was entitled to pay and allowances for the said period.

4. On 24.8.1981, Shri I.S. Parikh who was junior to the respondent was promoted to Class-I Post. According to the petitioner his case for promotion was probably not considered as he had requested for voluntary retirement, but as his application for voluntary retirement had not been sanctioned he was deemed to be in service and ought to have been considered for promotion on 24.8.1981 when his junior was promoted. It was further the case of the respondent that there were vacancies in Class-I post and the promotions were likely to take place soon, but as the respondent had applied for voluntary retirement his case may not be considered.

5. It was also the case of the respondent that he had not been permitted to cross the efficiency bar in the scale of Rs.650-30-740-35-810-EB-35-880-40-1000-EB-40-1200. That as the respondent had reached the stage of pay at Rs.810/- on 1.8.78, he was entitled to increment on 1.8.79. That, he had not been informed of the grounds for not allowing him to cross the efficiency bar.

6. In the background of the aforesaid facts, the respondent had prayed for the following substantive reliefs:

> *"19. In view of the aforesaid premises, the petitioner approaches Your Lordships by way of this petition under Article 226 of the Constitution of India and prays that Your Lordships will be pleased to issue a writ of certiorari mandamus or any other appropriate writ, direction or order -*
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> *[a] directing the Respondents 1 and 2 to issue order for payment of pay and allowances to the petitioner for the period from 28.2.1981 to 6.5.1982;*
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> *[b] directing the Respondents 1 and 2 to consider the petitioner to have been promoted on 24.8.81 when his junior Shri I.S.Parikh was promoted, or*
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> *[c] directing the Respondents 1 and 2 to promote the petitioner in Class-I in the next vacancy available and give him deemed date of promotion on 24.8.1981 i.e. the date on which his junior Shri Parikh was promoted;*
>
> *[d] directing the Respondents 1 and 2 to*

allow the petitioner to cross E.B. with effect from 1.8.1979."

7. In response to the notice issued in the writ petition, the respondents had entered appearance, but unfortunately no counter affidavit had been filed on their behalf. Hence, the petition was heard on merits without there being any affidavit-in-reply controverting the averments made in the petition.

8. The learned Single Judge after hearing the learned Counsel for the parties, was, on the basis of the material produced before the Court, convinced that the respondent was otherwise fit and eligible for promotion and that there was no bar or impediment to promote the respondent to the higher post and that it was his legitimate expectation. The learned Single Judge was also of the view that the promotion of the junior of the respondent was in violation of the provisions of Article 14 of the Constitution of India. Considering all aspects of the matter the learned Single Judge was of the view that the respondent ought to have been promoted and at least should have been given deemed date of promotion notionally from 24.8.1981 as the respondent had retired in the year 1988. The learned Single Judge accordingly directed that the respondent be deemed to be promoted on 24.8.1981, that is the

date when his junior Mr. I.S. Parikh was promoted to class I post and to compute and confer upon the respondent all the benefits accordingly. As regards the first prayer, the respondent was directed to make a representation to the competent authority, whereas there is no discussion regarding the prayer in connection with crossing the efficiency bar.

9. Heard, Ms. Asmita Patel learned Assistant Government Pleader for the appellants and Mr. Murli Devnani, learned Advocate for the respondent.

10. Learned Assistant Government Pleader, Ms. Patel has vehemently assailed the impugned judgement and order. It was submitted that there were departmental inquiries pending against the respondent; hence his case had not been considered for promotion. It was submitted that merely because no counter had been filed on behalf of the appellants the averments made in the petition could not have been accepted in toto without referring to the supporting documents. It was submitted that from a perusal of the record before the learned Single Judge, it is apparent the respondent had suppressed material facts from the Court. Referring to the order dated 19.3.1982 “Annexure-D” to the petition, it was pointed out that the request for voluntary retirement had been kept in

abeyance on the ground that Departmental Enquiry proceedings were pending against the respondent. It was submitted that though the said order had been annexed to the petition, insofar as the averments made in the petition are concerned, the respondent had chosen to maintain complete silence regarding the fact that departmental proceedings were pending against him. It was accordingly contended that the respondent had obtained relief by suppressing vital and material facts, hence, he was not fit to carry a writ of the Court and on this ground alone, the appeal deserves to be allowed by setting aside the impugned judgement and order.

11. It was further submitted that the learned Single Judge has not assigned any reasons for coming to the conclusion that the respondent was otherwise fit and eligible for promotion and that the promotion of his junior had affected the respondent’s right under Article 14 of the Constitution of India. Besides the said conclusions do not find any support from the material on record. It was submitted that reasons are the heart and soul of a judgment and therefore, it was incumbent upon the learned Single Judge to give reasons for arriving at the aforesaid conclusion, more so when there was absolutely no material on record for the learned Single Judge to come to such a conclusion.

12. It was also submitted that it was an admitted position as obtaining before the learned Single Judge that the respondent had not been permitted to cross the efficiency bar. Therefore, in the face of the evidence on the record of the case, the conclusions arrived at by the learned Single Judge are clearly erroneous. In conclusion it was urged that the impugned judgement and order be quashed and set aside and the appeal be allowed with costs.

13. On the other hand, Mr. Devnani learned Counsel for the respondent has supported the impugned judgement and order. It was submitted that in absence of any affidavit-in-reply controverting the averments made in the petition, the learned Single Judge had rightly accepted the averments made in the petition. It was submitted that it is settled legal position as laid down by the Apex Court in a catena of decisions that if there is no rebuttal to the averments made in a writ petition, the same should be presumed to have been admitted. It was submitted that the impugned judgement and order was just legal and proper and did not warrant any interference by this Court and that the appeal deserves to be dismissed with costs.

14. We have considered the rival submissions advanced by the learned Counsel for the parties

and perused the record of the case. Upon perusal of the impugned judgement and order, one cannot fail to notice that there are no reasons in support of the conclusions arrived at by the learned Single Judge. In the impugned judgement and order the learned Single Judge has firstly narrated the facts as stated in the petition and then given his conclusions. No reasons whatsoever have been assigned for arriving at the said conclusions.

15. Examining the case on merits, it may be pertinent to note that respondent’s junior, Mr. I.S. Parikh was promoted on 1981. However, the respondent had never voiced any grievance against the same at the relevant time nor had he staked his claim for promotion to Class-I post. In fact, though the period of sanctioned leave had expired on 27.2.1981, the respondent has not joined duty, taking refuge behind the specious plea that his application for voluntary retirement was pending and that the Government neither passed any orders on his application for voluntary retirement nor gave him posting orders. There is nothing on record to show that the respondent had ever attempted to join duty after the period of leave was over or that the appellants had prevented him from doing so. The respondent chose to remain absent from duty on one pretext or the other till he was posted at Rajkot as per his request, whereupon he resumed his duties on 7.5.1982.

16. A perusal of the order dated 19.3.1982 makes it amply clear that the respondent's request for voluntary retirement has been kept in abeyance pending finalization of departmental enquiry proceedings against him. Accordingly, there was no question of considering the respondent's case for promotion at the time when his junior was promoted on 24.8.1981. Moreover, as per the say of the respondent himself, his case could not have been considered at the relevant time as his application for voluntary retirement was pending before the authorities. Therefore, in any case no fault can be found with the concerned authorities in not considering the case of the respondent while considering the case of his junior for promotion. The learned Single Judge has overlooked the record of the case and therefore lost sight of the fact that the respondent was not permitted to retire voluntarily in view of the disciplinary proceedings pending against him. In the circumstances, even if the respondent had not applied for voluntary retirement the question of considering his case for promotion would not have arisen. In the circumstances, the learned Single Judge was not justified in holding that the respondent ought to have been promoted and at least should have been given deemed date of promotion notionally from 24.8.1981.

17. It may be pertinent to note that the learned

Single Judge has recorded a finding that on the basis of the material on record the respondent was otherwise found to be fit an eligible for promotion and that there was no impediment to promote the petitioner to the higher post. These findings given by the learned Single Judge are clearly contrary to the record of the case, inasmuch as, as noted earlier, departmental inquiries were pending against the respondent and he has also not been permitted to cross the efficiency bar. These facts speak for themselves, and even in absence of any rebuttal to the averments made in the petition, it is clear that the respondent was not eligible for promotion. In the circumstances, the findings arrived at by the learned Single Judge are clearly erroneous and cannot be sustained.

18. It is true that the appellants had not filed any affidavit-in-reply in response to the averments made in the petition. However, that by itself would not mean that the averments made in the petition have to be accepted at face value. A perusal of record of the case, makes it amply clear that the respondent has deliberately suppressed the fact that he was not permitted to retire voluntarily because of pending departmental enquiries. It goes without saying that in view of the pendency of departmental proceedings against him, the case of the respondent would not have been

considered for promotion. In the circumstances, considering the material on the record of the case, it is not possible to agree with the conclusions arrived at by the learned Single Judge.

19. The Supreme Court in the case of ***State of Haryana v. Haryana Civil Secretariat Personal Staff Association*** ((2002)6 SCC 72) has laid down that relief cannot be granted merely because the averments made in the petition have not been specifically rebutted; the High Court is bound to consider the averments on their true merits before granting relief to the writ petitioner.

20. In the facts of the present case, it is apparent that the relief has been granted merely because the averments made in the petitioner have not been specifically rebutted. The learned Single Judge has failed to consider the averments on their true merits before granting relief to the respondent.

21. It may be noted that after filing the present Letters Patent Appeal it appears that this Court had permitted the appellants to file their counter affidavit in response to the averments made in the petition. Accordingly, the appellants have filed an affidavit-in-reply rebutting the averments made in the petition as

well as bringing on record various facts regarding the nature of the departmental inquiries pending against the respondent; the reasons for not considering the respondent's case for promotion at the time when his junior was promoted; as well as the reasons for not permitting the respondent to cross the efficiency bar. However, as the averments made in the petition stood more or less rebutted from the documents produced in support of the petition, we have refrained from referring to the contents of the affidavit-in-reply and have based our decision on the record as obtaining before the learned Single Judge.

22. For the foregoing reasons, we are of the view that the impugned judgement and order suffers from various infirmities as stated hereinabove and as such cannot be sustained. We, accordingly, set aside the impugned judgement and order. Consequently, the writ petition filed by the respondent stands dismissed. The appeal is allowed with no orders as to costs throughout.

[A.M.KAPADIA, J.]

[HARSHA DEVANI, J.]

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